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CASE COMMENT

THE ARCTIC SUNRISE

1. Background to the arbitral proceedings

This case concerns measures taken by the Russian Federation against the Arctic Sunrise, a vessel chartered and operated by Greenpeace International and flying the flag of the Netherlands. The vessel has been used in a number of environmental protest actions around the world. Most recently, it was involved in direct action protests against drilling for oil by the Prirazlomnaya rig in Russian waters. This was part of a larger campaign by Greenpeace against oil drilling in the Arctic.

The incident has attracted a lot of public attention, largely as a result the media campaign run by Greenpeace calling for the release of the so-called 'Arctic 30'.¹ With the release of the crew in December 2013, public attention waned but the legal proceedings initiated by the Netherlands continued. The arbitral award on the merits of the dispute was issued in August 2015 and it addresses a number of interesting legal questions.

The incident that led to the arbitration took place on 18-19 September 2013. The Prirazlomnaya rig was to become one of the first ice-resistant platforms to be used for commercial oil drilling operations in Arctic waters. The Arctic Sunrise had travelled to the Pechora Sea with a view to protesting against the drilling. The Arctic Sunrise itself remained outside of the 500-metre safety zone which had been established around the platform, but it launched several small rigid hull inflatable boats (RHIBs) which approached the platform. The activists on board the RHIBs had intended to scale the platform and establish a camp in a survival capsule strapped to the side of the rig. The action was primarily aimed at bringing attention to the risks of drilling for oil in the Arctic but the activists had also made clear that they wished to bring operations on-board the platform to a halt for a short period, if possible. A statement issued prior to the action stated that 'a number of activists are determined to stay on in the capsule until such time as Gazprom promises to abandon its plans to drill for oil at Prirazlomnaya, or publishes its oil spill response plan in full and explains in a credible way how such drilling can be done without creating an unacceptable threat to the environment.'²

The campaigners had announced their plans in advance and they were met at the platform by the Russian coastguard vessel Ladoga. Russian officials, also in RHIBs, attempted to prevent the campaigners from scaling the platform. Two activists succeeded in attaching themselves to the platform but they were subsequently removed and detained by Russian officials. These two campaigners were taken directly back to the Ladoga. At this stage, the Greenpeace RHIBs decided to return

¹ See e.g. <http://www.greenpeace.org/international/en/campaigns/climate-change/arctic-impacts/Peace-Dove/Arctic-30/> <accessed 3 November 2015>.

² Arctic Sunrise, Award on the Merits of 14 August 2015, para. 84. Available at: <http://www.pcacases.com/web/view/21> <accessed 3 November 2015>. Hereafter, 'Award'.

to the Arctic Sunrise, which was waiting outside of the safety zone. They were pursued by the remaining Russian RHIBs. The precise facts that followed were key to the arbitration and they will be addressed in more detail below. Ultimately, the Arctic Sunrise was boarded the following day by Russian law enforcement officers descending from a helicopter. The ship and crew were arrested and taken to port in Murmansk. Initially, the crew were charged with piracy under the Russian Criminal Code, but these charges were later amended to hooliganism. The Master of the Arctic Sunrise was also charged with an additional administrative offence of failing to comply with the demands of an officer of the security agency of the state. The Arctic Sunrise was also seized.

As the flag state, the Netherlands protested against the arrest of the vessel, which it claimed was contrary to international law. Arbitral proceedings were commenced on 4 October 2013 on the basis of the United Nations Convention on the Law of the Sea (UNCLOS). The Netherlands also applied to the International Tribunal for the Law of the Sea (ITLOS) for provisional measures. ITLOS issued a provisional measures order on 22 November 2013 in which it called upon Russia to 'immediately release the vessel Arctic Sunrise and all persons who have been detained, upon the posting of a bond or other financial security by the Netherlands' and to 'ensure that the vessel Arctic Sunrise and all persons who have been detained are allowed to leave the territory and maritime areas under the Russian Federation.'³ Compliance with this order also became a question for the arbitral tribunal.

The Russian Federation neither participated in the provisional measures proceedings before ITLOS, nor did it participate in the arbitral proceedings. As a result, it was necessary for the Netherlands to request the President of ITLOS to appoint the majority of the members of the Tribunal in accordance with Article 3 of Annex VII of the UNCLOS. The Tribunal was thus composed of Prof. A.H.A Soons (appointed by the Netherlands), Dr A. Szekely, Mr H. Burmeister, Prof. J. Symonides and Judge T. Mensah. Judge Mensah was designated as the President of the Tribunal.

The Tribunal held that it had jurisdiction in a decision delivered on 26 November 2014⁴ and it issued its award on the merits on 14 August 2015.⁵ This short comment is principally concerned with the manner in which the Tribunal approached the

³ The "Arctic Sunrise" Case (Prompt Release), Order of 22 November 2013, ITLOS Case No. 22, para. 105.

⁴ Arctic Sunrise, Award on Jurisdiction of 26 November 2014. Available at: <http://www.pcacases.com/web/view/21> <accessed 3 November 2015>. The Award on Jurisdiction largely concerned whether or not Russia's Declaration made upon ratification of UNCLOS excluded this type of dispute from the jurisdiction of the Tribunal. The Tribunal held that the Declaration, as interpreted in light of UNCLOS, did not exclude its jurisdiction. For comment, see A. Oude Elferink, 'The Arctic Sunrise Incident: A Multi-Faceted Law of the Sea Case with a Human Rights Dimension' (2014) 29 *International Journal of Marine and Coastal Law* 244-289.

⁵ *Supra* (n2).

legality of the arrest of the Arctic Sunrise by the Russian authorities. It will also deal with the question of compliance with the provisional measures order.

2. Nature of the Claims

Before turning to the merits of the claims, one of the first questions addressed by the Tribunal concerned the standing of the Netherlands to bring the claims. It was uncontested that the Arctic Sunrise was flying the flag of the Netherlands at the time of its arrest and therefore, in accordance with established principles of international law, the Netherlands was permitted to advance claims not only on behalf of the ship and its owners, but also the crew and other people on board who were 'involved in' or 'interested in' the vessel's operation.⁶ According to the Tribunal, 'all thirty individuals on board the Arctic Sunrise at the relevant times were "involved" or "interested" in the ship's operations.'⁷ This is an important decision, because not all 30 individuals on board were considered to be crew members, but they were still considered to be involved in or interested in the operation of the vessel, demonstrating a broad understanding of this concept.

Although the claims were being brought by the Netherlands on behalf of the Arctic Sunrise and all of those individuals on board the vessel, the Tribunal nevertheless considered them to be 'direct claims' of the Netherlands.⁸ This follows the reasoning of the ITLOS in cases such as *M/V Saiga (No.2)* or *M/V Virginia G* when it held that it was necessary to take into account whether the provisions invoked by the claimant state conferred rights on states or on ships and persons.⁹ In this respect, the Tribunal is clear that the provisions invoked by the Netherlands, namely Articles 56(2), 58, 87 and 92 of UNCLOS, all constituted 'provisions owed to States under the Convention.'¹⁰ This decision has a number of consequences. Firstly, it means that the exhaustion of local remedies rule in UNCLOS does not apply.¹¹ Secondly, it may have implications for other litigation arising from this incident, a point that we will be returned to below.

3. The Legality of the Arrest

The Tribunal started its analysis of the legality of the arrest by noting that the Arctic Sunrise had been involved in a protest action and 'protest at sea is an internationally lawful use of the sea related to the freedom of navigation.'¹² At the same time, it recognized that 'the right to protest is not without its limitations and when the protest occurs at sea its limitations are defined, inter alia, by the law of the sea.'¹³

⁶ Award, para. 171, drawing upon previous jurisprudence of ITLOS. See *M/V Saiga (No. 2)*, Judgment of 1 July 1999, ITLOS Case No. 2, para. 106; *M/V Virginia G*, Judgment of 14 April 2014, ITLOS Case No. 19, para. 127.

⁷ Award, para. 171.

⁸ Award, para. 173.

⁹ See *M/V Virginia G* (n6) para. 156; *M/V Saiga (No. 2)* (n6) para. 98.

¹⁰ Award, para. 168.

¹¹ Award, para. 173.

¹² Award, para. 227.

¹³ Award, para. 228.

The key question faced by the Tribunal was therefore whether the Russian authorities had the authority to arrest the vessel under international law. This involved complex questions of law and fact. The task of the Tribunal was not facilitated by the failure of Russia to participate in the arbitral proceedings. These difficulties had already been explicitly addressed by ITLOS in the provisional measures proceedings when it said that ‘the Russian Federation could have facilitated the task of the Tribunal by furnishing it with fuller information on questions of fact or law.’¹⁴ The Arbitral Tribunal also noted that ‘Russia’s non-participation in the proceedings had made the Tribunal’s task more challenging than usual [and] in particular, it has deprived the Tribunal of the benefit of Russia’s views on the factual issues before it and on the legal arguments advanced by the Netherlands.’¹⁵ Indeed, as will be seen below, the failure of Russia to appear could arguably have had some consequences for the findings of the Tribunal relating to key facts underpinning the decision.

The first potential legal basis for the arrest considered by the Tribunal related to piracy. As noted above, the original charges laid by the Russian authorities explicitly identified the acts as piracy, even though these were later amended because the Russian authorities themselves did not believe that this allegation was supported by the facts.¹⁶ As a matter of international law, piracy is defined as ‘any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed ... against a ship, aircraft, persons or property in a place outside the jurisdiction of any state.’¹⁷ Direct protest actions against by organisations such as Greenpeace or Sea Shepherd have been held by some national courts to amount to piracy.¹⁸ However, the critical fact in the present case was ‘the *Prirazlomnaya* is not a ship’ and therefore the acts did not fall within the definition of piracy.¹⁹ For this reason, the Tribunal did not have to consider the more controversial element of the definition of piracy, namely whether direct protest actions by groups such as Greenpeace can be considered to be acts of violence committed for private ends.

The second potential legal basis for the arrest considered by the Tribunal related to the jurisdiction of a coastal state over offshore platforms. Under UNCLOS, the

¹⁴ ITLOS Order (n3) para. 54. Some individual judges were even more explicit, see e.g. Declaration of Judge ad hoc Anderson, para. 2: ‘While the position of the Netherlands was made clear, the stance of the Russian Federation had to be taken from its diplomatic communications, legislation and the decisions of courts in the Russian Federation. Unfortunately, these materials were both incomplete and in places inconsistent, making the task of the Tribunal more difficult. Thus, the decision of the Russian Federation not to appear in this case is to be regretted. Non-appearance does not serve the efficient application of Part XV of the Convention or, more widely, the rule of law in international relations.’

¹⁵ Award, para. 19.

¹⁶ Award, para. 238.

¹⁷ UNCLOS, Article 101(a)(ii)

¹⁸ See most recently *Institute of Cetacean Research v Sea Shepherd Conservation Organization*, United States Court of Appeal for the Ninth Circuit, Order (amended) of 24 May 2013. See also *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin*, Belgian Court of Cassation, Judgment of 19 December 1986.

¹⁹ Award, para. 238.

coastal state has the power to regulate activities on board platforms as well as in safety zones around such platforms.²⁰ As noted above, the Russian authorities had established a 500 nautical mile safety zone around the platform, in which ships were prohibited from navigating without the permission of the coastal state.²¹ This basis of jurisdiction offered a more convincing basis for the assessment of the arrest, compared to the piracy provisions of UNCLOS.

As the Arctic Sunrise had never entered the safety zone itself, the arrest had to be based upon the notion of constructive presence. This doctrine refers to the situation when 'a foreign ship outside the territorial waters sends boats into territorial waters which commit offences there, the mother ship renders herself liable to seizure by reason of these vicarious operations.'²² On this basis, the RHIBs and the Arctic Sunrise could be treated as acting together, so that the Arctic Sunrise was deemed to be subject to the jurisdiction of the coastal state. Yet, the actual arrest of the vessel did not take place when the RHIBs were still in the safety zone, but only after the Arctic Sunrise and the RHIBs had left the area. The Tribunal therefore had to determine whether the conditions of hot pursuit under Article 111 of UNCLOS had been satisfied. Previous tribunals have held that the conditions in Article 111 are cumulative and they must all be satisfied by a state carrying out an arrest.²³ It follows that the interpretation of these conditions became a key issue, as they define the boundary between legitimate exercise of coastal state jurisdiction and unlawful interference with freedom of navigation.

The first condition addressed by the Tribunal was whether the pursuing vessels had given the appropriate signal at the commencement of the pursuit. In this regard, UNCLOS requires that 'the pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen to heard by the foreign ship.'²⁴ On a strict interpretation of this provision, a radio signal given at a distance may not be sufficient. Indeed, the interpretation of this condition explicitly arose during the drafting of a previous version of this provision, when the International Law Commission noted that 'signals given at a great distance and transmitted by wireless' would not count for the purposes of signaling the commencement of a pursuit.²⁵ Thus, the International Law Commission anticipated that the pursuing vessel must make some kind of other signal to the pursued vessel,

²⁰ UNCLOS, Articles 56 and 60. On coastal state jurisdiction in safety zones, see S. tho Pesch, 'Coastal State Jurisdiction around Installations: Safety Zones in the Law of the Sea' (2015) *IJCLM* 512-532; J. Harrison, 'Safeguards against Excessive Enforcement Measures in the Exclusive Economic Zone', in H. Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill/Nijhoff, 2015) 244-226.

²¹ The fact of whether a safety zone had been established was contested by the Netherlands but the Tribunal appears to accept that the Russian authorities had validly done so; Award, paras 248-249.

²² Lord McNair, *International Law Opinions*, Vol. 1 (1956, Cambridge University Press) 245. As noted by Gilmore, there are questions about the extent of the doctrine of constructive presence to cases involving a ship acting with other boats, but this does not arise in the present case; W. Gilmore, 'Hot Pursuit'

²³ *M/V Saiga* (No. 2) (n6) para. 146.

²⁴ UNCLOS, Article 111(4).

²⁵ International Law Commission, 'Draft Articles on the Law of the Sea' (1956 II) *YbILC* 284-285.

such as the use of sirens or lights. It is therefore significant that the Tribunal in the present case rejected such a narrow understanding of this condition. Rather they preferred an evolutionary interpretation of UNCLOS, stating that 'given the large areas that now must be policed by coastal States and the availability of more reliable advanced technology (sea-bed sensors, satellite surveillance, over-the-horizon radar, unmanned aerial vehicles), it would not make sense to limit valid orders to stop to those given by an enforcement craft within the proximity required for an audio or visual signal that makes no use of radio communication.'²⁶ This interpretation is in line with the works of many commentators who have called for 'a flexible interpretation in order to permit the effective exercise of police powers on the high seas'²⁷ and it is notable because it is the first time that such a decision has been made by an international court or tribunal.²⁸ As a result, the actions of the Ladoga, which used VHF radio to contact the Arctic Sunrise, satisfied this condition.

The second condition addressed by the Tribunal was whether the vessels were still in the safety zone when the pursuit commenced and the signal to stop was given. The Tribunal admitted that the evidence on this point was more difficult to decipher. What is interesting is that the Tribunal gives some margin of appreciation to the Russian authorities in deciding that the signal was given at the appropriate time. The Tribunal notes that Article 111(4) requires a coastal state to satisfy itself 'by such means as may be available' that the pursued vessel was still in the relevant maritime zone and the Tribunal interprets this phrase to mean that 'the location of the foreign ship at the time of the first stop order should not be evaluated with the full benefit of hindsight.'²⁹ Thus, the Tribunal continued with its flexible interpretation of the conditions attached to the right of hot pursuit in Article 111.

The Tribunal would also appear to take flexible approach to the question of the identification of the arresting authorities. On this point, UNCLOS is clear that 'the right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.'³⁰ This requirement was clearly satisfied by the Ladoga, which was a marked coastguard patrol vessel. However, the Tribunal noted that the helicopter that carried out the final arrest was 'unmarked and the men descending from it did not, in the recollection of the crew of the Arctic Sunrise, identify themselves.'³¹ Despite this apparent omission, the Tribunal nevertheless was

²⁶ Award, para. 260.

²⁷ R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edn: Manchester University Press, 1999) 216; see also C.H. Allen, 'Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices' (1989) 20 *Ocean Development and International Law* 309-341.

²⁸ Similar interpretations have been made by domestic courts, however. See W. Gilmore, 'Hot Pursuit: The Case of *R v Mills and Others*' (1995) 44 *ICLQ* 949, 956.

²⁹ Award, para. 267.

³⁰ UNCLOS, Article 101(5).

³¹ Award, para. 101 – in para. 100 they point out that the only marking on the helicopter was a red star on its bottom sign.

'satisfied, in context, that the vessel was boarded by Russian officials.'³² This finding again demonstrates a willingness to take a contextual approach to the interpretation of the hot pursuit provisions in UNCLOS.

The final condition addressed by the Tribunal was whether the pursuit was continuous in accordance with Article 111(1) of UNCLOS. It is in relation to this condition that the actions of the Russian authorities were considered to fall short of the hot pursuit requirements in UNCLOS. In many respects, the initial actions of the Russian authorities conformed to what one may expect from a maritime interdiction operation. The captain of the *Ladoga* first ordered the *Arctic Sunrise* to stop and warning shots were fired at the vessel when the Greenpeace ship failed to comply with this instruction. A boarding operation, using RHIBs, was also attempted, although it was not successful. These facts clearly demonstrate the difficulty for states in carrying out arrests at sea. The *Ladoga* also threatened to open direct fire on the *Arctic Sunrise* and it is clear from the relevant rules of international law that such a use of force to stop a vessel may be lawful, provided that the force is necessary and reasonable.³³ Ultimately, the *Ladoga* did not carry out its threat.³⁴

Following these failed efforts to arrest the vessel, the *Ladoga* continued to follow the *Arctic Sunrise*, but it paused in its attempts to actively try and board the vessel. During this period, the *Ladoga* is described by the Tribunal as 'shadowing' the *Arctic Sunrise*.³⁵ Indeed, there was no radio communication between the two vessels for almost 24 hours until a message was sent to the *Arctic Sunrise* from the *Ladoga* on the evening of 19 September, once again ordering the vessel to heave to and receive an inspection team. It was shortly thereafter that the Russian helicopter approached the *Arctic sunrise* and carried out the arrest.

The situation in this case can be clearly distinguished from other cases in which a break in the pursuit has been deemed to undermine the arrest of a vessel. For example, in the *M/V Saiga* (No. 2), the recall of the patrol boat was considered by ITLOS to be 'a clear interruption of [the] pursuit.'³⁶ No such clear interruption happened in this case. Nevertheless, the change of tactics on the part of the Russian authorities from the evening of the 18 September until the evening of the 19 September was deemed to be highly significant by the Tribunal.³⁷ The Tribunal concluded that 'the *Ladoga* remained in proximity to the *Arctic Sunrise* not as part of an ongoing pursuit, but rather to ensure that the Greenpeace ship did not undertake any further actions at the platform and in the expectation of further

³² Ibid..

³³ *M/V Saiga* (No. 2) (n6) para. 155.

³⁴ The *Arctic Sunrise* had indicated that there were petroleum stores on board the vessel and it would seem that this fact had prevented the Russian authorities from firing on the vessel; see Award, para. 94.

³⁵ Award, para. 271.

³⁶ *M/V Saiga* (No. 2) (n6) para. 147.

³⁷ Award, para. 271.

instructions from a higher authority.’³⁸ In other words, the pursuit was held to be interrupted.

This finding of interruption was fatal to the legality of the arrest and it therefore requires careful scrutiny. It is doubtful whether the mere pause in an attempt to actively arrest a vessel can alone be classified as an interruption of the pursuit. Such an interpretation would not fit easily with the operational reality of maritime enforcement where it may be necessary for a state to take time to consider its tactics and call in appropriate support. Yet, there were other contextual factors that were taken into account by the Tribunal in reaching its determination and that support its conclusion. In particular, the Tribunal noted the willingness of the Russian authorities to receive a RHIB from the Arctic Sunrise to deliver food and clothing to the two detained activists.³⁹ It must be admitted that, whatever one thinks about the pause in attempts to arrest the Arctic Sunrise, this particular behaviour is more difficult to explain in the context of an active maritime interdiction operation.

It is in this last respect that the non-participation of the Russian authorities in the proceedings can be considered to be significant. The finding of the Tribunal essentially relates to the motivations of the Russian Federation. On the facts that were available, it was a reasonable interpretation and the Netherlands can be considered to have satisfied the burden of proving an interruption through its presentation of the evidence. Yet, there may well have been other explanations for the actions of the Russian authorities on 18-19 September 2013 that would have justified the change in tactics, but which were not apparent from the evidence that was before the Tribunal. If Russia was an active party to the arbitration, it could have put forward its own explanation of why it decided to pause in its attempts to board the Arctic Sunrise and to take on board food and clothing for the two detained activists. By failing to participate, Russia lost this opportunity to persuade the Tribunal of the motivations for its actions.

It should be noted that the Tribunal considered several other possible bases for the arrest, including terrorism and prevention of ecological adverse environmental consequences, but none of them were accepted as valid grounds for the exercise of jurisdiction by a coastal state on the basis of the facts of the case. Indeed, these bases were largely speculative, but they were addressed by the Tribunal in pursuit of its duty under Article 9 of Annex VII, according to which ‘the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.’⁴⁰

What the Tribunal did not appear to do was to consider a possible different justification for the arrest of the two activists who were seized whilst trying to scale the platform itself. Given that these two individuals were arrested whilst physically on the platform, it would appear that the jurisdiction of the Russian Federation

³⁸ Award, para. 272.

³⁹ Award, para. 95.

⁴⁰ See Award, para. 234.

rested upon a firmer footing compared to the later arrest of the activists on board the Arctic Sunrise.⁴¹ Yet, throughout its Award, the Tribunal consistently talks about the crew in the collective and the dispositive of the Award expressly states that ‘by arresting, detaining, and initiating judicial proceedings against the Arctic 30, the Russian Federation breached its obligations owed to the Netherlands.’⁴² The Tribunal could have done more to explain its position in this respect given the different circumstances surrounding their arrest.⁴³

4. Failure to comply with provisional measures

The Tribunal also considered arguments by the Netherlands that Russia had failed to comply with the provisional measures order of ITLOS. ITLOS itself had expressly noted that such measures are binding and thus states are under a legal obligation to comply.⁴⁴ The order called for, inter alia, the prompt release of the vessel and the crew, subject to the payment of a bank guarantee, which the Netherlands had provided on 2 December 2013. In the arbitral proceedings, the Netherlands argued that Russia had failed to comply with these measures in a prompt manner.

There would appear to have been a clear violation in relation to the vessel. The Arctic Sunrise was not released until 6 June 2014 and it was not until 1 August 2014 that the vessel was finally given clearance to leave port. In other words, there was a delay of almost seven months and the Tribunal concluded that this was a “patent” violation of the provisional measures order.⁴⁵

The situation was less clear in relation to the crew. All 30 individuals were released from custody on 29 November 2013, i.e. before the payment of the bank guarantee on 2 December 2013. However, they were not allowed to leave the country, as expressly required by the ITLOS Order, until 29 December 2013. According to the Tribunal, ‘the 27 day delay did not meet the promptness requirement’ and it ‘demonstrates insufficient effort on the part of Russia positively to ensure that the individuals could leave the country.’⁴⁶ However, it could be said that the Tribunal is perhaps a little too quick in its criticism of Russia in this respect. In the case of an obligation to release a vessel or crew as a provisional measure, promptness needs to be considered with some care. After all, there is no general obligation under UNCLOS to ensure prompt release of vessels and crews in all circumstances, but

⁴¹ See para. 92 of the Award. However, the Tribunal later, somewhat cryptically, questions the status of Ms Saarela and Mr Weber; see para. 274. This is another example where the lack of participation by the Russian Federation counted against it, as it was not able to fully clarify whether these two individuals were in detention.

⁴² Award, para. 401(C).

⁴³ One may also question the reference to the ‘Arctic 30’ in the dispositive, given that this term is somewhat value-laden as it was coined by Greenpeace International as part of its media campaign calling for the activists to be freed. In order to maintain their impartiality, tribunals must make all attempts to present the facts in an unbiased manner.

⁴⁴ ITLOS Order (n3) para. 101.

⁴⁵ Award, para. 355.

⁴⁶ Award, para. 350.

only in relation to specified matters.⁴⁷ As a consequence, states may not have in place specific procedures through which they can give effect to more general provisional measures orders relating to release.⁴⁸ In these circumstances, a state may have to employ whatever domestic procedures are available and release may take more time compared to situations in which release is ordered on the basis of specific prompt release powers. Prompt compliance can thus only be judged taking into account the situation of a particular state. At the same time, this finding provides another example where the Tribunal had limited facts at its disposal and the failure of Russia to participate in the proceedings means that it had not given any explanation to the Tribunal for the reasons for any delay. This omission clearly counted against the Russian Federation.

5. Reparation

Having found violations of UNCLOS, the Tribunal turned to the question of remedies. The Tribunal considered that its findings provided sufficient satisfaction and it was not necessary for the Russian Federation to issue a separate apology or guarantee of non-repetition.⁴⁹ Nor did the Tribunal believe it was necessary for it to order a formal dismissal of the charges against the detained activists, as it agreed that all proceedings had already been terminated by Russia.⁵⁰ The Tribunal did, however, order various forms of reparation and compensation in relation to the costs incurred by the Netherlands as a result of the unlawful acts of the Russian Federation, i.e. the payment of the deposit for the arbitration and the costs incurred by issuing the bank guarantee. In addition, the Tribunal ordered compensation for, inter alia, damage to the vessel, costs incurred due to the loss of use of the vessel, non-material damage to the detained activists for their wrongful arrest and detention and the costs they had incurred both during the trial and up until their departure from the Russian Federation.⁵¹ The award of compensation to the individuals in particular raises certain questions about the relationship between the arbitration and other related proceedings.

6. Implications for related litigation

The arbitral proceedings under UNCLOS are not the only international litigation to arise in the aftermath of the Arctic Sunrise arrest. It is also reported that several of the detained individuals have also commenced proceedings before the European Court of Human Rights (ECHR), alleging a violation of their rights under Article 5 and Article 10 of the European Convention on Human Rights.⁵² This is an example of a growing phenomenon of parallel proceedings in international law, where different treaty provisions are used for the initiation of different actions based upon the same

⁴⁷ See UNCLOS, Article 292. See also Articles 73(2) and 226(1)(b).

⁴⁸ Indeed, some of the dissenting judges have suggested that prompt release should not be available as a provisional measure; see e.g. ITLOS Order (n3) Separate Opinion of Judge Jesus, para. 7(b); Dissenting Opinion of President Golitsyn, para. 49

⁴⁹ Award, para. 380.

⁵⁰ Award, para. 387.

⁵¹ The Tribunal reserved all questions of quantum to a further hearing.

⁵² See Award, para. 134.

set of facts.⁵³ However, the ongoing litigation before the ECHR raises the possibility of reparation being duplicated for the same set of events. Whether the applicants will have success in that case will in part depend upon how the ECHR interprets Article 35(2)(b) of the ECHR which provides that ‘the Court shall not deal with any application submitted under Article 34 that ... is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.’ It is suggested that, whilst there is strictly speaking no *res judicata*, given that the legal parties and the legal basis of the claim differ between the two sets of proceedings.⁵⁴ In this respect, it is important to remember that the Tribunal considered the claims of the Netherlands to be direct claims of the flag state. There is nevertheless a strong argument that the two sets of proceedings address ‘substantially the same matter.’⁵⁵ This is particularly the case in light of the fact that the Tribunal has already ordered compensation for the wrongful arrest, prosecution and detention of the Greenpeace activists. Moreover, the Netherlands had itself partly characterized the claims in the arbitral proceedings as raising human rights issues, albeit not under the International Covenant on Civil and Political Rights and not the European Convention on Human Rights, which is another ground of similarity.⁵⁶ In any case, the ECHR must be very careful, at least in respect of awarding remedies, that it does not allow doubly recovery.

7. Conclusion

The award in the Arctic Sunrise arbitration addresses important issues in relation to the ability of coastal states to undertake maritime enforcement operations. Whilst the Russian Federation was found to have violated these conditions, it could be said to have lost on the basis of a failure to satisfy the technical conditions of hot pursuit, rather than as a result of a blatant disregard for UNCLOS and international law.⁵⁷ Indeed, the award implicitly upholds the position that coastal states can take enforcement action in safety zones that are established in accordance with UNCLOS and they are entitled to pursue and arrest vessels that commit offences within those zones, provided that they meet the conditions of hot pursuit. Furthermore, although the Russian Federation lost the case, the Tribunal actually adopts an evolutionary interpretation of the conditions attached to hot pursuit in Article 111 of UNCLOS, which takes into account the modern context of maritime law

⁵³ Nollkaemper has referred to this as ‘cluster litigation’; A. Nollkaemper, ‘Cluster-Litigation in Cases of Transboundary Environmental Harm’ in M. Faure and S. Ying (eds), *China and International Environmental Liability: Legal Remedies for Transboundary Pollution* (Edward Elgar 2008) 11-37.

⁵⁴ See e.g. W. Dodge, ‘Res Judicata’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law: Online Edition* (Oxford University Press, 2006).

⁵⁵ For a discussion of this provision, see Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003) 213 ff.

⁵⁶ Award, para. 140.

⁵⁷ Legal Counsel for Greenpeace has been quoted as saying that ‘governments exist to uphold the rule of law, not to act as armed security agents for the oil industry. This kind of behavior is not limited to the Russian authorities – across the world, environmental activists are facing serious intimidation from those who wish to silence them’; see <http://www.greenpeace.org/international/en/press/releases/Russian-government-broke-international-law-in-Greenpeace-Arctic-30-case---tribunal1/>

enforcement. The interpretation of the Tribunal would not appear to support the view that the conditions of hot pursuit must be interpreted narrowly.⁵⁸ Rather, the Tribunal stresses the importance of taking into account the object and purpose of these rules, in accordance with the ordinary rules on treaty interpretation.⁵⁹ In many ways, the legal interpretations of the Tribunal make it easier for coastal states to satisfy the conditions of hot pursuit. Ultimately, the decision against the Russian Federation rests upon a particular appreciation of a complex set of facts, in which the actions of the Russian coastguard were interpreted as an abandonment of what had started as a legitimate pursuit. This finding highlights the importance of state participation in international judicial proceedings, as a means of ensuring that all possible arguments and facts are put squarely before the court or tribunal. In this respect, failure to participate was arguably a strategic error of the Russian Federation.

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⁵⁸ Contrast e.g. Tho Pesch (n20) 530.

⁵⁹ 1969 Vienna Convention on the Law of Treaties, Article 31(1).